UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES M. HARRISON,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, *et al.*,

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

/

2:08-cv-00802-RCJ-RJJ

ORDER

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, by James M. Harrison.

A Nevada state court jury found Harrison guilty of first degree murder, and then, under Nevada law, his case proceeded to the penalty phase of the trial, to determine Harrison's sentence. In the penalty phase, the jury deadlocked, and the court declared a mistrial. Petitioner now awaits a retrial of the penalty phase of his trial.

As grounds for relief under § 2241, Harrison contends that, under the Double Jeopardy Clause of the United States Constitution, the State is prohibited from seeking the death

penalty against him. The court determines that Harrison is not entitled to habeas corpus relief, and denies the petition.

Factual background

In 2002, fifty-eight year old Dan Miller was found dead in his Las Vegas apartment. On November 12, 2002, Harrison and Anthony Dwayne Prentice were charged, in connection with Miller's death, with conspiracy to commit murder, burglary, and murder with the use of a deadly weapon. Docket #2, pp. 70-74. On November 20, 2002, the State of Nevada filed notice of its intent to seek the death penalty. *Id*., pp. 75-78. The trials of Harrison and Prentice were severed.

On November 21, 2006, a jury found Harrison guilty of murder. Following that verdict, the case proceeded to the penalty phase of the trial before the same jury.

On November 27, 2006, after the evidence had been presented, and arguments made by counsel, and after the jury had deliberated for some time, the jury announced that they were deadlocked and were unable to reach a verdict as to Harrison's sentence. *Id.*, pp. 30-36. Just prior to declaring a mistrial, the court had the jury foreperson turn over all the verdict forms, completed or not, to the bailiff. *Id*. Among those forms were two "special verdict" forms that had been completed and signed by the foreperson – one finding that an aggravating circumstance (the murder involved the mutilation of the victim) had been established, and one finding that numerous mitigating circumstances had been established. *See id.*, pp. 93-95. The jury did not fill out the verdict forms that were to be used to indicate whether or not mitigating factors outweighed the aggravating circumstance, and what sentence was to be imposed. *See id.*, pp. 46-47.

At the outset of the November 27 hearing, Harrison's counsel requested that the court inquire as to whether the jurors had made any determinations regarding the existence of aggravating circumstances and regarding whether they had reached a decision regarding the death penalty. *Id.*, pp. 30-36. The State opposed that motion. *Id*. The trial court denied the motion, and did not poll the jury in the manner requested by Harrison's counsel. *Id*.

Thereafter, on June 20, 2007, Harrison filed a Motion to Strike the Death Penalty, arguing that, by again seeking the death penalty, the State would be subjecting him to unconstitutional double jeopardy. *Id*., pp. 15-36. The State filed an opposition to that motion. *Id*., pp. 38-47. Petitioner filed a reply. *Id.*, pp. 49-52. The state district court denied the motion on July 12, 2007. *Id.*, pp. 54-55.

On July 13, 2007, Harrison filed, in the Nevada Supreme Court, a Petition for Writ of Mandamus, or, in the Alternative, a Writ of Prohibition and Emergency Motion for Stay of Proceedings, seeking an order that the state district court strike the notice of intent to seek the death penalty. *Id*., pp. 57-131. The State answered. *Id*., pp. 133-55. On September 7, 2007, the Nevada Supreme Court denied the petition. *Id*., pp. 157-58.

Harrison filed the instant federal habeas petition on June 20, 2008. Harrison asserts in his habeas petition that, after the dismissal of the jury, his counsel learned from certain jurors – Robert Hecker (the jury foreman), Amy Ellwanger, and Suzanne Emerson – that the jury deadlocked at nine to three, with nine jurors in favor of imposing a sentence of life in prison without the possibility of parole, and three jurors in favor of imposing a sentence of life in prison with the possibility of parole, and that none of the twelve jurors was in favor of imposition of the death penalty. Harrison relies upon affidavits of the three aforementioned jurors in making this assertion. *Id*., pp. 23-28.

In state court proceedings, the State produced an affidavit of another juror – Mary Pizzi – stating that "[t]he death penalty was never 'off the table' as a potential punishment option for me as a juror." *Id*., p. 45.

Discussion

As noted, Harrison contends that the Double Jeopardy Clause of the Fifth Amendment prohibits the State of Nevada from pursuing the death penalty against him. Harrison is not held in custody pursuant to the judgment of a state court, as no judgment of conviction has been entered in his case; therefore, Harrison is in the position of a pretrial detainee, and his federal habeas

petition is made under 28 U.S.C. § 2241, rather than § 2254. *See Stow v. Murashige,* 389 F.3d 880, 886 (9th Cir. 2004). Because Harrison's double jeopardy claim presents an exception to the general rule that a federal court must abstain from interfering in ongoing state criminal proceedings, this court shall address the merits of his petition. See *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir.1992) (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

The Double Jeopardy Clause assures three basic protections – it protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *See United States v. Ursery*, 518 U.S. 267, 273 (1996); *Witte v. United States*, 515 U.S. 389, 395-96 (1995). In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Supreme Court held that the clause applies to capital-sentencing proceedings where such proceedings "have the hallmarks of the trial on guilt or innocence." *Id*. at 439.

Any argument that the clause does not apply to Nevada's capital sentencing proceedings was foreclosed by the Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). In *Ring*, the Court held that the Sixth Amendment requires aggravating circumstances be proven to a jury before the death penalty may be imposed because the aggravating circumstances "operate as the functional equivalent of an element of a greater offense" than a non-capital version of the same offense. 536 U.S. 609 (internal quotation marks omitted). In *Sattazahn*, the Court interpreted *Bullington* to hold that, for the same reason, the Fifth Amendment's Double Jeopardy Clause applies to capital sentencing proceedings. 537 U.S. at 111 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Thomas, J.), 125 n.6 (opinion of Ginsburg, J., joined by Stevens, J., Souter, J., and Breyer, J., dissenting on other grounds).

Recognizing that the Double Jeopardy Clause applies to Nevada's capital sentencing proceedings, this court agrees with Harrison's premise that an "acquittal" of the death penalty at sentencing would terminate his initial jeopardy, thereby precluding the State of Nevada from further

pursuit of the ultimate punishment. *See Arizona v. Rumsey*, 467 U.S. 203, 211-212, (1984) (holding that trial judge's acquittal in sentencing phase barred second sentencing even though it was based on erroneous construction of the law governing a particular aggravating circumstance). *See also*, *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (noting that "acquittals, unlike convictions, terminate the initial jeopardy") (citation omitted). The problem for Harrison is that no plausible interpretation of existing legal authority would allow this court to conclude that he has been acquitted of the death penalty in the state proceeding at issue.

An acquittal in this context is "an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment for [petitioner's] offense." *Rumsey*, 467 U.S at 211. In concluding that an acquittal had occurred, the Court in *Rumsey* explained:

> The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.

Id. Here, by contrast, Harrison asks this court to find an "acquittal" based on a hung jury, the "special verdict" forms the jury had completed, and the affidavits from three jurors which were signed and sworn several weeks after they had been excused from service.

The Supreme Court has made clear that a deadlocked jury in the penalty phase of a capital case does not constitute an acquittal for double jeopardy purposes. *See Sattazahn*, 537 U.S. at 109. Evidence that Harrison's jury had found the existence of only one aggravating circumstance and more than 20 mitigating circumstances does not change this result. In Nevada, it is the relative weight, not the number, of aggravating and mitigating circumstances that dictates the jury's decision on the death penalty. Nev. Rev. Stat. § 175.554. *See*, *e.g.*, *Johnson v. State*, 148 P.3d 767, 771 (Nev. 2006) (noting that jury had imposed the death sentence after finding seven mitigating circumstances were outweighed by one aggravating circumstance). For obvious reasons, this court is not willing or able to conduct the weighing on the jury's behalf.

Similarly, the three affidavits Harrison has compiled do not transform the hung jury into an acquittal. Beyond the fact that they are not even competent evidence under Nevada law (*see* Nev. Rev. Stat. § 50.065), the affidavits are a pale substitute for an actual verdict rendered by the entire jury within the deliberation process. This court shares the view of the Seventh Circuit Court of Appeals, which aptly noted:

> . . . "post-trial affidavits of individual jurors are rarely helpful to the process of reviewing the collective action of a jury. The institution of the jury has force only when it acts authoritatively by rendering a unanimous verdict. It is the verdict of the jury, not the individual expressions of jurors after a trial, that carries legal heft."

Jacobs v. Marathon County, 73 F.3d 164, 169 (7th Cir. 1996). The dangers of allowing such affidavits to stand in the place of an actual jury determination or decision are readily apparent. As noted in the State's briefing in the state court proceedings, "[i]t is impossible to know what outside influences may have tainted . . . the affidavits taken in this case several weeks up to several months after the court's admonition[s] had been lifted." Docket #2, p. 139. Also suspicious is that, other than information identifying the affiant and the dates executed, all three affidavits are virtually identical to each other in all pertinent respects. *See Jacobs*, 73 F.3d at 168 (noting that "lawyer-generated affidavits . . . that fit[] comfortably into a litigant's view of a case, invite[] the raising of an eyebrow or two").

In summary, the affidavits, like the partially-completed verdict forms, fall well short of constituting an acquittal, thereby taking Harrison out of initial jeopardy. Consequently, there is no constitutional impediment to the State continuing to pursue the death penalty against Harrison.

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IT IS THEREFORE ORDERED that the "Pretrial Petition For A Writ Of Habeas Corpus Pursuant To 28 U.S.C § 2241 By A Person In State Custody" (docket #2) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of the habeas corpus petition (docket #2), and a copy of this order, on the following, by certified mail:

David Roger
Clark County District Attorney
200 South Third Street, 5th Floor
Las Vegas, NV 89155

Catherine Cortez Masto
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

Dated this 25th day of June, 2008.

UNITED STATES DISTRICT JUDGE

(df-p6)